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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,

Petitioner,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

It is of course unnecessary to reply in kind to defendant's many suggestions that plaintiff and the Solicitor have misread the record. With one hardly critical exception—the statement that defendant's "private brand" engine, the "Gale" sells for approximately 15% less than its technically identical "brand" engines, the "Johnson" and "Evinrude" motors (plaintiff has bought both the Gale and the Johnson and hence has invoices showing their respective prices)—plaintiff is satisfied it can demonstrate that every factual statement

in its Petition is supported in the record by evidence either received or proffered.

It is of course also unnecessary to state that the Government, before reaching its decision to file an "amicus curiae" brief, under the name of the Solicitor General, examined the record to be certain that the factual recitation in its brief was supported by the evidence.

DISCUSSION OF FACTS

In the present posture of this case, defendant's emphasis on what it chooses to call the "facts" is misplaced: the central point in plaintiff's petition is that it has not yet had an *opportunity* to put in its factual evidence, that the courts below have denied it a full hearing on the merits, a chance to fill in the bare skeleton of ultimate facts outlined in its proffer of proof. The question before the Court is not whether the allegations in plaintiff's complaint and the summary of documents and testimony in plaintiff's proffer have all been established as "facts"; the question, rather is whether those allegations—and summaries—if *ultimately established as true* (as must be assumed for the present purpose of considering the district court's summary dismissal of the case)—constitute a violation of law.

Central to the plaintiff's case are four factual propositions, three of which plaintiff either introduced or proffered evidence and which were unambiguously accepted as facts by both of the lower courts.

1. Defendant Outboard Marine has some 60% of the national market in outboard motors, a $155 million dollar industry in 1961.

2. Plaintiff Amplex was defendant's largest dealer in the State of Maryland (out of about 76 such dealers in the State as well as out of the approximate 104 dealers in territory number 23).

3. Defendant cancelled the dealership of plaintiff Amplex *for the reason that* plaintiff took on, and refused to stop

handling, a competing manufacturer's engines, the "Mercury" engines.[1]

A fourth important proposition, although denied here by defendant, has been prima facie established by the evidence received and proffered:

4. The termination of plaintiff's dealership was part of an "unofficial policy" of defendant's to impose exclusive dealing on its some 8,700 dealers to prevent them from handling the engines of competing manufacturers, and that this policy has had the *effect* of maintaining a noncompetitive market structure in the industry and thus of injuring competition.[2]

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[1]The district court said: "Of course, there is the proof, which I accept for the purposes of this stage of the proceedings, that the plaintiff's franchise was not renewed *for the invidious reasons* of Mr. Schiavina (defendant's salesman), namely, that this was done to exclude Mercury as one of the products which the plaintiff handled . . ." (Appdx. B-4, emphasis added). The court of appeals, after reciting the July visit of defendant's salesman to plaintiff's place of business and his "protest" to plaintiff about taking on the Mercury line, said that: "Later, in August or September 1961, this representative advised Amplex that Outboard would not renew its dealership because of Amplex's agency for Mercury . . ." (Appdx. A-5, emphasis added)

[2]The defendant repeatedly asserts in its brief in opposition to certiorari that the evidence affirmatively establishes that it had a policy of not discriminating against dealers who sold competing engines. First, this is rebutted by the testimony of Paul Wright as hereinafter set forth, by the proffered testimony relating to pressures and threats made by other representatives of the defendant to dealers who desired to sell competing engines (reproduced in this Reply Brief as Appendix C) and by the very act giving rise to this action—the refusal to deal with its best customer in the State of Maryland solely because of an involvement with a competing engine, minor as it was (12 engines on consignment).

The support for the defendant's allegation to this effect is found in DX 9, PA 142, a statement written by the Johnson management. The platitude "actions speak louder than words" seems particularly appropriate.

Propositions 2 and 3 are closely related: the fact that plaintiff was the largest of defendant's approximately 76 dealers in the State of Maryland is, plaintiff believes, an adequate answer to defendant's persistent dragging in of charges, that the real reason for the cancellation was an alleged lack of tidiness[3] on plaintiff's part. As Lincoln is said to have replied to an attack on Grant's alleged lack of sobriety: "Tell me what brand he drinks so that I can send some to my other generals." Plaintiff bought 194 engines from defendant Outboard in 1961, for $85,000, or some 40% more than defendant's 2nd largest dealer in the State (177 engines, for $60,048).[4] Plaintiff paid cash for all of them. (Amplex

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[3]The charge of financial irresponsibility is similarly ill-founded. In the first place, defendant Outboard accepts no credit orders (dealers must pay in cash, *prior* to delivery) and hence runs no credit risks with its dealers. Further, it was proffered that a Mr. Robert Ewart, sales representative of Lone Star Boat Company, a major supplier of plaintiff, would testify if called that "he knew Amplex to be among the top outboard boat and motor dealers in the country in every respect: . . . that during his association with Lone Star, Amplex never had more than minor financial problems with the (Lone Star) Boat Company and that in many instances the disputes involved shortcomings on Lone Star's part; that subsequent to the loss of Amplex's Johnson franchise, he experienced grave concern for the company, realizing from his background and his experience that such a setback and loss would, of necessity, result in a sales decline of Lone Star boats and severely curtail public acceptance." (PA 103, emphasis added) Similarly, it was proffered that a representative of a prominent marine distributor would testify, if called, "that Amplex was one of the biggest and best accounts of the Whiting Company in 1961 and that its payments of account were satisfactory in relation to its growth and volume; that the volume of marine supplies and purchases and accessories purchased by Amplex rapidly increased from $400 in 1956 to $21,000 in 1961 and back down again to $500 and $600 in 1965." (PA 104)

[4]Defendant's reference to the alleged sales of 500 engines by another dealer many years ago is misleading. In the first place, the source of that figure is a sales report filed by Schiavina, defendant's salesman, in support of his recommendation that plaintiff be cancelled and this other dealer (located some 10 miles from plaintiff) be fran-

purchased over 373% more engines from Outboard Marine in 1961 than did 56 other Johnson, Evinrude and Gale dealers in Maryland. (PX 55-57, PA 122-32) On this question of plaintiff's alleged shortcomings as a dealer, it was proffered that a Mr. Robert J. Robichaud, a member of a New York University School of Retail Research team employed by the Outboard Boating Club (an industry trade association) to make a detailed survey of the retail marine market throughout the United States, would testify if called that he had visited and studied the operation of numerous marine dealers throughout the country and that "in the summer of 1960, he personally interviewed the principals of Amplex and subjected the Amplex dealership to a most

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chised: "At one time they were selling over 500 Evinrude motors until they had a misunderstanding. This was 5 to 10 years ago and I do hope they can do the same for Johnson Motors now." (PA 148) The year 1959, for example, was the one in which the outboard motor industry reached its all-time high in sales, $255 million compared with $155 million in 1961, a recession year. In any event, however, that dealer that had allegedly sold 500 engines in that earlier era purchased from defendant, in the 15-month period following his replacement of Amplex, a total of 27 engines. (DX 48, at PA 149; PX 78, at PA 140; DX 49, at PA 150) This compares, as noted, with 194 engines purchased by plaintiff Amplex in 1961. In addition, defendant was so eager to take on this dealer (Nat Gates) to replace plaintiff that it waived the usual requirement of a financial statement from a dealer prior to signing him up. (PA 148) In fact, as the proffered testimony of another supplier demonstrated, that dealer (Gates) was then "on a COD basis only (with that supplier) with a very poor credit rating." (PA 104) In fact, Gates' operation had totally deteriorated if in fact he ever enjoyed such prosperity. As was inevitable from the beginning, a decision cancelling a dealer (Amplex) with credit lines in excess of $200,000 (PA 37-38) and a net worth of $100,000 for a dealer that had no credit or adequate floor plan, was doomed to failure. (See PX 78, PA 140.) In fact, Gates did such a poor job for the defendant that he was cancelled on 4/13/64. It is significant that, following Gates' termination, the defendant gave a second franchise to Smith Marine (who was content to sell Johnson engines only) on Ritchie Highway, about one mile from the defunct Amplex establishment. (PX 55, PA 122)

thorough inspection in every respect, including therein (its) display, merchandising, location, management, finances, internal controls and so forth; that upon the conclusion of the nationwide survey, he *ranked Amplex among the outstanding dealerships in the United States* and so informed the officials of Johnson Motors at the Chicago trade show in the fall of 1960." (PA 115, emphasis added)

Proposition 5—that Plaintiff's cancellation as defendant's dealer was part of a deliberate exclusive dealing "policy" of defendant's and that this policy has had adverse competitive effects—is not, as defendant contends, unsupported in the record. For the nation as a whole, it was proffered that "there were between 12,000 and 15,000 outboard engine marine dealers in 1961. It is in evidence that the defendant had 8,700 dealers in 1961." (PA 99) It was further proffered that a Mr. Belden Burns, a salesman for two leading boat companies in the Middle Atlantic States since the mid-1950's, would testify if called that: "With few exceptions, Johnson and Evinrude dealers never carried another line of engines, although occasionally such a dealer would sell a specialty engine such as Bundy." (PA 109, emphasis added) The "exceptions", as we have pointed out in our Petition, are largely dealers located in rural areas or other communities where it is difficult to find a replacement for a recalcitrant dealers: For instance see PA 97-98, Schiavina referring to Sassafras Boat Sales in PX 81. "There isn't too much choice from in this area so I guess we just have to live with this situation until something comes along." See also PX 80, PA 141, Schiavina referring to Chester River Boat Sales, "I would like to find a good prospect for this area. I would make a change." Both of these dealers sold competing engines. A Mr. Paul Wright, a former Outboard salesman, testified that defendant had an "unofficial policy of exclusive dealing," one that was "common knowledge" among the employees of the defendant[5] and that he personally followed that policy in his relations with his dealer-customers:

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[5](PA 64-65) This testimony was erroneously stricken by the District Court.

Q. Now, speaking of yourself and your own actions, Mr. Wright, in what ways, if at all, did you deviate from the official written policy of Johnson Motors?

A. Well, primarily in the field of contacting dealer prospects who were handling another line of engines and whom I was interested in establishing as a Johnson dealer in the area. I would talk to them, tell them what we were interested in, like to have the business, pointed out to them that we would consider their becoming a dealer *with strong implications that we would expect them to carry the Johnson line and the Johnson line alone and phase out or drop, or phase out what they were presently handling.*

Do I make myself clear?[6]

This Outboard salesman gave several instances in which he had done this:

1. *Welsh's Boat Yard, Wrightsville, Pennsylvania:* "Well, I had tried to get Welsh to go along and really phase out and get rid of his Scott engines . . . and when he refused to do this, it was convenient to appoint a dealer in the York area . . ." (PA 66) The dealer appointed to punish Welsh for refusing to phase out Scott was Ilgenfritz Marine, who was quite willing to drop the West Bend and Oliver engine to obtain a Johnson franchise. (PA 66)

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[6](PA 65, emphasis added) Defendant denies that it requires new dealers to "phase out" whatever competing engine they might have been handling previously, citing as an example Nat Gates, the dealer that replaced Amplex after its cancellation. But the very sales report in which the substitution was contemporaneously reported to the home office eloquently illustrates this "phase out" policy: "I am recommending this prospect (Gates) for a Johnson franchise to market Johnson Motors for Edgewater & Arnold (Maryland) and vicinity. This is my replacement for Amplex Marine. *He is now handling Mercury Motors, but may decide to terminate business relations within a year from this date. I am going along with this because of the situation that now prevails in Arnold (Amplex).*" (PA 148, emphasis added)

2. *Pancoast Boat Sales, Woodbury, New Jersey:* "This man was a marine dealer handling the Champion outboard motor and was a parts distributor for Champion, whom I contacted and was much interested in Johnson and who in the course of negotiations and franchising *decided to give up his Champion Line of engines and go to Johnson strictly*." (PA 66, emphasis added)

3. *Guyon's Marina, Stone Harbor, New Jersey:* ". . . I was able to persuade him to give up the Scott franchise and phase out his Scott engines and go Johnson exclusively." (PA 66-67)

4. *Amplex Marine, Arnold, Maryland:*

A. Well, even Amplex Marine, when I talked to them about going Johnson, strongly suggested that they give up their Scott franchise.

THE COURT: They suggested or you suggested?

THE WITNESS: I did, Your Honor. To phase out their remaining inventory of Scott engines that they had on hand.

These are typical examples.[7]

5. *Schulte Boat Works, Philadelphia, Pennsylvania:* This Mercury dealer "wanted to go Johnson and between the first and second call I made on this organization, they decided to remain with Mercury because they had just renewed their franchise and couldn't afford to give it up . . . I was trying to get him to go Johnson and give up his Mercury franchise." (PA 67) Asked about a sales report in which he had commented that Schulte was "a bit of stubborn German and it takes time to wear him down", the defendant's former salesman testified that he was making it clear to the home office that "it will take further work and contact and persuasiveness to get him to join Johnson as a dealer and give up his present line of engines. This is the inference and my intent." (PA 69)

[7](PA 67, emphasis added) It should be noted, contrary to the assertions in the defendant's brief, Mr. Wright arranged for the Scott phase out prior to recommending Amplex for a franchise.

6. *Porgaze Brothers, Philadelphia, Pennsylvania:* This was "one of the largest Scott-Atwater dealers in Philadelphia and we had been for some time trying to secure additional representation in the Philadelphia area, and I called on them and tried to get them to handle the Johnson line and handle it exclusively." (PA 73)

Other illustrations of the "unofficial policy" of exclusive dealing by Outboard Marine are presented in the plaintiff's proffer of proof (set out, for the Court's convenience, in an appendix hereto). For example, it was proffered that a Mr. Lester Jackson of Falls, Oklahoma, a former Evinrude dealer whose franchise had been cancelled after 22 years (for his refusal to order certain unwanted items, as demanded by defendant's salesman), would testify if called that he was told by defendant's salesman "that Evinrude's (defendant's) *policy* forbade the handling of a second line and that if Mr. Jackson would take on such a line, he would cancel his Evinrude franchise." (PA 112)

Plaintiff points to such evidentiary details as these not because it thinks they are particularly significant in the present posture of his case but simply to illustrate that there is in fact record support for the factual matters recited in its petition, that a prima facie case has in fact been made out. As noted, we believe the three critical facts here are (a) the defendant's 60% market share, (b) the fact that plaintiff Amplex was cut off *because* of its refusal to give up a competing manufacturer's engines, and (c) the fact that this termination of plaintiff's dealership was part of a general exclusive dealing policy on defendant's part, one that has had adverse competitive effects. The first two of these facts was accepted by both of the lower courts and is presumably not in serious dispute here. The third—the fact of competitive injury—has been commented on by the Solicitor General in these words: "The court below did not reach the question of the anticompetitive effect of respondent's exclusive dealing arrangements and that question is not before this Court. Ten years ago, the Federal Trade Commis-

sion held that the respondent's exclusive dealing arrangements had a significantly adverse effect upon competition because they foreclosed competing manufacturers from a significant share of the market . . . *Petitioner's (Amplex's) proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission.*"[8]

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

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December 1967

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[8]Memorandum for the United States as *Amicus Curiae* in Support of the Petition for a Writ of Certiorari, pages 7 and 8, footnote 13 (emphasis added). Thus, whereas the Solicitor is saying that the issue of competitive injury is "not before this Court" because a prima facie case of such injury has been made out in the record and is not subject to challenge in a summary proceeding such as this one, defendant apparently reads this footnote as a statement by the Solicitor that proof of competitive injury, is not required in cases of this character (Respondent's Brief in Opposition to Petition for Certiorari, page 33, footnote 41), an interpretation of the Solicitor's language that we believe to be clearly incorrect.

APPENDIX C

(Proffer)

[769] MR. FREISHTAT: Beginning first with a statistical proffer of evidence from the Boating Industry magazine produced by the boating industry, 1965, if admitted into evidence, this magazine would show that in 1961, 343,000 outboard engine units were sold; that further in 1961, the retail dollar volume of these 343,000 units is $155,000,000.

If admitted into evidence, the annual Market [770] Research Notebook written by the Boating Industry Association would confirm these identical figures.

The plaintiff will proffer that the price list of Outboard Marine Corporation indicates a markup of thirty-two percent on its outboard marine engines. Further, thereupon reducing the retail dollar volume of the $155,000,000 by the thirty-two percent, and outboard engines are fair traded, the retail -- the wholesale dollar volume becomes $108,500,000.

THE COURT: May I have that figure again, please?

MR. FREISHTAT: $108,500,000.

Based upon Outboard Marine Corporation's unit vol-

the dealers who was only handling Johnson alone subsequently, is that correct? A. Yes.

Q. Now, where is Holt's Marine located? A. Seaford, Delaware.

Q. Would you classify that as a rural as compared to an urban area such as Baltimore? A. Rural area.

Q. Where is Etynors Marine Service located? A. Etynors?

Q. Etynors, I'm sorry. A. High Spire, Pennsylvania.

Q. Would you consider that as a rural area rather than an urban area such as Baltimore? A. It's not as big as Baltimore. It's a small coal -- steel mill area. I would say -- it's right next to Harrisburg. I would say it's urban.

Q. Do you know the population of that particular city where it's located? A. I sure don't.

Q. Now, where was Sassafras Boat Sales located? A. Georgetown, Maryland.

THE COURT: I am sorry, sir, but I did not get that name.

[742] THE WITNESS: I'm sorry, sir. Georgetown.

THE COURT: Georgetown.

THE WITNESS: Maryland.

BY MR. FREISHTAT:

Q. Would you classify their location as a -- would you consider this dealer as one of those dealers that you had to live with because there was no one else better to take his place? A. No.

THE COURT: Now, Georgetown, Maryland is where? On the Eastern Shore of Maryland?

THE WITNESS: Yes, sir.

Q. Perhaps I can refresh your recollection, Mr. Schiavina. Can you identify this?

MR. FOLEY: May I see it, please?

MR. FREISHTAT: I'm sorry.

(Document handed to Mr. Foley by Mr. Freishtat.)

A. This is Sassafras Boat Sales.

Q. And what's the date of the report, sir? A. I can't see it. It looks like --

ume of 198,186 in evidence for 1961 and Outboard Marine Corporation's wholesale dollar volume of $64,984,155 in evidence, exclusive of parts, Outboard Marine Corporation in 1961 controlled 57.78 percent of the unit volume of the industry and 59.89 percent of the total dollar volume of the industry.

In addition, it is proffered that Outboard Marine Corporation sold $39,300,133 worth of parts in 1961, which would substantially increase its percentage of dollar volume of the total engine and parts industry.

It is proffered that there were between 12,000 and 15,000 outboard engine marine dealers in 1961. It is in evidence that the defendant had 8,700 dealers in 1961.

It is proffered that Amplex sold $25,000 more [771] engines, more Johnson engines in 1961 than any other dealer in Territory No. 23.

It is proffered that Outboard Marine Corporation has canceled or did not renew in excess of 4,000 dealers between 1960 and 1965.

It is proffered that if Officer John Marozza were to testify before this Court, he would testify that he is a police officer of Baltimore City and an outboard boat owner since 1960 and that he purchased his Lone Star boat and Johnson engine from Amplex; that he had been a regular customer of Amplex in 1960 and '61 and he personally observed the excellent displays, inside and out, that characterized the Amplex operation during those years; further that he was present in the Amplex showroom on July 20th, 1961 and that he witnessed a heated argument between a Johnson sales representative and Mr. Canzona; that the entire subject of the conversation had to do with Amplex's Mercury franchise across the street; that during the aforementioned argument, he heard this representative threaten that Amplex must give up its Mercury franchise or lose its Johnson franchise. He subsequently became embarrassed at the heat of the conversation and left.

THE COURT: Now, let me go back for just a moment.

On these various statistics about unit sales and [772] dollar volume which you have proffered, these two publications are the ones which I think have already been marked for identification, are they not?

MR. FREISHTAT: No, sir, we neglected to mark them for identification; they have not been --

THE COURT: All right. They may certainly be so marked, if you wish, but these are the same publications that were tendered before, are they not?

MR. FREISHTAT: Yes, sir, they are.

THE COURT: All right. Now, this time, are you going to have anybody appear to testify as to the degree to which the statistics are based on estimates, how the estimates were made and the probable accuracy of the estimates?

MR. FREISHTAT: I have contacted various representatives of the two major magazines. Let me phrase it this way, sir. I am hopeful of obtaining one of the gentlemen in from Chicago, which is the nearest place, to testify but, however, I have done considerable additional research in this area and though I'm not prepared to do so at the moment, I do feel that the cases will support the admission of these two booklets without the necessity of bringing in this gentleman from Chicago. As I say, however, I will be prepared at a subsequent date to provide Your Honor with the authorites which I feel support this petition.

Incidentally, if I might digress for a moment, [773] on the face of one of these magazines, it specifically states that these figures are the best obtainable in the industry and --

THE COURT: I understand the magazine says they are the best obtainable but the magazine also says that they are partially estimates.

MR. FREISHTAT: Yes, sir, it certainly does.

THE COURT: It seems to me I have got to have some evidence of the probable accuracy or the probable inaccuracy or something of that sort.

MR. FREISHTAT: However, I would suggest this to the Court. Through the defendant's own prospectus, they are acknowledging --

THE COURT: The defendant simply says it thinks it has over fifty percent of the market. I have read the prospectuses.

MR. FREISHTAT: Well, in light of that admission and in light of the estimates that are contained in these documents, the specific percentage between excess of fifty and fifty-nine percent, I personally do not feel is --

THE COURT: But is it your position that fifty-nine percent per se proves monopoly?

MR. FREISHTAT: No, sir. Fifty-nine percent is one factor amongst others which --

THE COURT: Certainly it is but I did not know [774] whether you thought that you had -- for example, in line with the statement of Judge Hand, I think it is, in the Aluminum Company case, whether you were claiming that you had proved sufficient market dominance that you in effect create a presumption of monopoly and cast the burden of proof on the defendant.

MR. FREISHTAT: No, sir. It is one major factor that must be considered amongst others.

THE COURT: All right.

MR. FREISHTAT: When we get to arguing the law, I'll pursue it at that time.

THE COURT: I will be glad to hear you. Now, please get on with your proffer.

MR. FREISHTAT: Yes, sir.

Mr. Robert L. Swanson will testify that he had been for several years a Claims Manager for Nationwide Insurance Company and during 1960 and '61, he assisted Amplex as a part-time salesman; that during the winter of '60 and '61, Amplex enjoyed an amazing boom in lay-away sales on motors and he was responsible for many of these sales; that the great increase in sales was in large measure, in his opinion, due to Amplex's Johnson franchise; that the public reception and desire for Scott

outboard motors as he found it in selling for Amplex during the aforementioned period was extremely limited.

[775] Throughout the first several months of '61 when he worked as a salesman, the Amplex showroom was always decked out attractively with displays of new Johnson motors, boats and rigs.

Mr. Harry James will testify before this Court that he succeeded a Mr. Robert Ewart, E-w-a-r-t, as the Lone Star Sales Representative for the Middle Atlantic States in the summer of 1960 and remained in that capacity until April of 1962; that one of his biggest and best accounts was Amplex, that in his opinion, Amplex's great increase in sales in '60 and '61 was due to its having the right product lines, principally Lone Star, Johnson motors and Revel Craft and to its modern merchandizing and service techniques; that he witnessed in September of 1961 the conversation between Mr. Canzona and Mr. Preston and Mr. Foster of Johnson Motors at the Chicago trade show and that Mr. Canzona informed both Mr. Preston and Mr. Foster of the threat by Schiavina to terminate Amplex because of the new Mercury franchise.

He will testify that during the aforementioned conversation, Mr. Preston and Mr. Foster remained completely noncommittal and evasive and merely reiterated that Amplex would probably lose its franchise; that he, Mr. Harry James, lost considerable confidence in Amplex after the termination by Johnson for he knew from his long experience in the marine trade that the loss of a prime franchise such as Johnson or [776] Evinrude assuredly would curtail sales, not only of motors but of his Lone Star boats as well.

Further, that Lone Star had only minor and inconsequential disputes with Amplex until after the Johnson termination where there was a serious decline in sales and more serious financial difficulties occured.

Further, that the Boating Industry magazine is the accepted trade publication for the marine industry and there is no more authoritative publication. Further,

that in seeking out new dealers, he invariably approaches Johnson and Evinrude outlets first, realizing from his experience and observation that these dealers sold the biggest dollar volume of boats, as well as motors.

Mr. Robert Ewart will testify that he was --

THE COURT: That is H-e-u --

MR. FREISHTAT: No, sir. It's E-w-a-r-t.

THE COURT: E-w-a-r-t. Thank you.

MR. FREISHTAT: That he was the Lone Star Boat Company's representative servicing the Amplex account until the summer of 1960 and that thereafter, he represented the Owens Yacht Company in the Middle Atlantic States; that prior to late 1961, he knew Amplex to be among the top outboard boat and motor dealers in the country in every aspect; that his best dealers for Lone Star and Owens were by far the area's Johnson and Evinrude dealers; that subsequent to the [777] loss of the Johnson franchise by Amplex, he observed on frequent visits a noticeable decline in business activity and public acceptance; that during his association with Lone Star, Amplex never had more than minor financial problems with the Boat Company and that in many instances, the disputes involved shortcomings on Lone Star's part; that subsequent to the loss of Amplex's Johnson franchise, he experienced grave concern for the company, realizing from his background and his experience that such a setback and loss would, of necessity, result in a sales decline of Lone Star boats and severely curtail public acceptance.

Further, that he cannot recall a single time on his frequent visits to Amplex that attractive displays were not prominent in the showroom, inside and out, or that the Johnson motors were not prominently and attractively displayed.

Further, that the Boating Industry is the accepted trade journal throughout the industry and there is no more authoritative publication available.

Mr. J. Wistar, W-i-s-t-a-r, Rowe, R-o-w-e, will

testify that he has been a Sales Representative of the William H. Whiting Company for in excess of fifteen years; that the William H. Whiting Company is one of the most prominent marine supply distributorships in the east and that during these many years,he had intimate dealings with outboard [778] boat and motor dealers throughout Maryland and adjoining areas; that Amplex was one of the biggest and best accounts of the Whiting Company in 1961 and that its payments of account were satisfactory in relation to its growth and volume; that the volume of marine supplies and accessories purcased by Amplex rapidly increased from $400 in 1956 to $21,000 in 1961 and back down again to $500 and $600 in 1965.

Further, that he on the basis of his long experience in the marine industry and knowing the public demand for Johnson motors and Evinrude motors attributed this decline to the loss of the Johnson Motors franchise; that his principal accounts among outboard and motor dealers were those who had either Johnson or Evinrude franchises; that these dealers almost invariably were the biggest and the busiest outlets and they bought and sold by far the largest quantity of marine supplies; that on his numerous visits to Amplex throughout 1961, he always found the displays to be of exceptional high quality; and finally, that in 1961, Mr. Nat Gates was a customer of Whiting and Company and they were on a COD basis only with a very poor credit rating.

Mr. Robert Reynolds will testify that he was employed as a responsible Manager of Amplex in 1956 through 1962; that among his duties were sales and service supervision, as well as inventory control; that at no time did Mr. Schiavina during any of his calls on Amplex take inventory [779] of Johnson motors with Mr. Reynolds; that during the calls in July and September, Mr. Schiavina in fact did not take any inventory at all.

That on July 20th, 1961, he observed Mr. Schiavina in the showroom engaged in a heated argument with Mr. Canzona and others over the Mercury franchise across

the street; that he heard Mr. Schiavina state to Mr. Canzona that if Amplex did not get rid of the Mercury franchise, Johnson would get rid of Amplex; that the showroom of Amplex during the first nine months of 1961 always contained a display of numerous boats, boat rigs and new Johnson motors.

Mrs. Margie Smouse, S-m-o-u-s-e, will testify that she, as secretary to Mr. Canzona, observed his extremely troubled reaction to the phone call of Mr. Schiavina in early July of 1961; that she knew that it was Mr. Schiavina on the phone since she had answered the phone and called Mr. Canzona to the phone; that she, as secretary to Mr. Canzona, visited the showroom on July 20th, 1961 and overheard a violent argument between Mr. Schiavina and Mr. Canzona and several others and that a portion of the argument which she heard pertained to Amplex's having a Mercury franchise across the street. She heard nothing more.

Mr. James Harris will testify that his background and experience in the marine industry dates back to 1953 in the servicing and sales of outboard motors; that he once [780] served a Mercury distributor in a service capacity; that he served Scott as Field Representative and Sales Representative; that he later served Bundy in the capacity of Field, Sales and Service Representative; that he used the Amplex facilities as a regional service station for Scott outboard motors and knew the Amplex shop to be among the best outboard service facilities in the locale.

That Amplex from the standpoint of displays, service, identification, size and reliability ranked among the top marine dealers in the eastern states.

Further, that the market for Scott outboard motors suffered a severe decline in 1960 and '61 leading to an extensive cutback in the Scott field force and to the eventual closing of the Minneapolis plant in the latter part of 1962; that thereafter, the Scott dealer organization for almost all practical purposes ceased to exist in the Mid-

dle Atlantic States; such dealers as there remained were inconsequential.

THE COURT: What were the years that you say this decline started?

MR. FREISHTAT: The market for Scott suffered a decline in '60 and '61.

THE COURT: Thank you.

MR. FREISHTAT: That subsequent to the loss of the Johnson franchise by Amplex, he experienced a marked loss of [781] confidence in Amplex, stemming from his experience and knowledge over many years as to the damaging effects the termination of a prime franchise such as Johnson would have on a dealer; that he foresaw and later observed the decline in sales and service activity, which he knew would result from the loss of Johnson; that the Boating Industry magazine is the accepted trade journal throughout the boating industry and is relied upon by all manufacturers and dealers in the normal operation of their business.

Mr. George E. Etzel, E-t-z-e-l, will testify that he has been for many years a successful insurance broker in the Baltimore metropolitan area and that he has extensive training and experience in inspecting and rating commercial risks of all types; that he visited Amplex on March 2nd and again on March 10th, 1961, for the purpose of purchasing a Revel Craft boat and Johnson seventy-five horsepower outboard motor; that on the occasions of both visits, he found attractive displays of new boats, new Johnson motors and complete rigs in the Amplex showroom and that the outside display area was attractively laid out; that on these and subsequent visits, he observed no noticeable difference in the cleanliness and attractiveness of Amplex.

That on the occasion of his two visits in March 1961, he made a special point to visit Amplex's service shop and that upon his inspection, he found it to be well [782] organized, neat and clean; that he in fact observed only one minor fire violation, in testimony to the clarity of his recollections; that on the one occasion after his

purchase that he needed service on his motor, Amplex accorded him that service promptly and expertly the very same day.

Further, that he would never again purchase an outboard motor from Amplex because he would not buy any engine other than a Johnson and that he in fact recently visited Smith Marine near Amplex, right up the street, in the course of shopping for a new hundred horsepower outboard motor to replace his seventy-five horsepower engine.

Now, Your Honor, I have a series of individuals, approximately ten in number, who would all testify as to the same basic set of facts as to displays and the service facilities, some of which are very distinguished and reputable people in the community.

Agnes Turner; Father Cloman, C-l-o-m-a-n, Riggie, R-i-g-g-i-e; General Clifton B. Cates, C-a-t-e-s; Brigadier General S. S. Ballantine; Mr. Oliver Hanson; Mr. Nicholas Wagner; Mr. Don Marshall; Mr. Frank Janzzak, J-a-n-z-z-a-k; W. Kirkwood Kelly; Captain Joseph Bowersox.

A Mr. Gordon Meyer will testify as to the desirable attributes of the Amplex dealership that led them to make their purchases of boats and motors in 1960 and '61. They will testify as to the attractive displays at Amplex, [783] the quality and efficiency of the service, the cleanliness of the premises and the courtesy and helpfulness of the management and employees; that after Amplex lost the Johnson franchise, they experienced a drop in confidence in the dealership for fear that Amplex would not be around or able to service their Johnson motors.

Inspector Barnes Braun, B-r-a-u-n, will testify that from 1960 to the present, he has been an enforcement officer for the Chesapeake Bay Affairs Division of the State of Maryland, a member of the Tidewater Fisheries Police and that his job during the boat season principally is to patrol the Bay and tributaries and the outboard

speedboats; that in '60 and '61, he relied on Amplex's service department to keep his Johnson outboard motors in good repair and that Amplex also serviced other Johnson motors in the police fleet; that Amplex did an excellent job of servicing these Johnson motors, frequently even under the pressure of emergency conditions; that the premises of Amplex, including both the display areas and service facilities, were invariably neat, attractive and efficient in '60 and '61; that he and other members of the Tidewater Police preferred Amplex's service to that of other Outboard Marine Corporation dealers in the area in '60 and '61.

That the Tidewater Police purchased most of their engine parts from Amplex and found Amplex to maintain a [784] generous supply of the Johnson motor parts for the Johnson motors.

Mr. William Russell will testify that he witnessed and participated in the July 20th argument between Mr. Canzona and Mr. Schiavina, in which the latter threatened to terminate Amplex's Johnson franchise unless Amplex got rid of Mercury; that he was directly involved in all of Amplex's efforts subsequent to the loss of the Johnson franchise and its effort to sustain the business or even to diversify it in an effort to save it following the loss of the franchise and that despite the intensified program to maintain the outboard marine business volume after the loss of Johnson, sales nevertheless rapidly declined to a point by mid-summer of 1961 when Mr. Russell left for overseas at which the business sank into serious market and financial difficulties.

THE COURT: Wait a minute. What was this latter? The business declined until the summer of 1961?

MR. FREISHTAT: Business declined subsequent to the summer of 1961.

THE COURT: I see. All right.

MR. FREISHTAT: Mr. Belden Burns will testify that he had been employed by the Owens Yacht Company and the Revel Craft Manufacturing Company from the mid-1950's through 1961 and that most of his duties during

these years involved the sales and service of Owens and Revel Craft [785] dealer accounts in the Middle Atlantic States. Amplex was his biggest and best account for Revel Craft in 1960 and '61; that in the spring of 1961, as at all other times, he visited Amplex on the average of two or three times a week, owing to its proximity to the Revel Craft plant, that on all visits he found Amplex's premises and showroom to contain attractive displays of new boats, new Johnson motors and complete rigs.

That Amplex in February of 1961 displayed new boats and motors over approximately thirty percent of the main floor space in the Chesapeake Bay boat show at the Fifth Regiment Armory.

In his dealings, he always found Amplex was a financially sound and responsible dealer; that when he heard of the loss of Amplex's Johnson franchise, he experienced a serious drop in confidence in the dealer, knowing from his long experience in the industry that the absence of a prime franchise such as a Johnson line would reflect in decreased sales and market curtailment of public acceptance and that secondary lines such as Mercury or Scott would not suffice to replace a prime line.

That his major accounts invariably were Johnson or Evinrude dealers and that these, including Amplex, accounted for most of his volume in both Owens and Revel Craft; that there were approximately 110 dealers that he would call on at Revel Craft. With few exceptions, Johnson and Evinrude [786] dealers never carried another line of engines, though occasionally such a dealer would sell a specialty engine such as Bundy. Of the approximate 110 dealers that he was familiar with, the majority and the better outlets were always Johnson or Evinrude dealers.

A Mr. Walter Johnson, Jr. of Philadelphia will testify that they were trading as Johnson and Towers and had been a distributor of Johnson motors for approximately thirty-five years and that they were among the largest dealers in the United States; that in the latter part of

1959, a Mr. William Jonas, J-o-n-a-s, Sales Manager of Johnson, demanded that they cease handling a Neptune outboard motor that they had taken on. The Neptune was a low priced, small horsepower specialty product that competed with the lower horsepower Johnson engines. In compliance with Mr. Jonas' demand, they took the Neptune off display but continued to handle it; however, they kept a separate inventory for the Neptune engine so that the District Representative in his examination of their premises would not know that they were still selling the Neptune engine.

Walter Johnson, Sr. will testify that all the years that he has been in the marine industry, in excess of forty years, he has always relied upon the Boating Industry magazine in the operation of his business.

Based upon his thirty-five years, thirty-five to [787] forty years of experience in the marine industry, in his opinion, neither the Mercury, Gale or Scott engine had nearly the appeal or public acceptance of a Johnson engine or Evinrude.

Mr. Larry Berry of Philadelphia will testify that he was told by Mr. Schiavina at the end of 1961 that he either take on the Johnson Motors' new boat line or that he, Schiavina, would summarily cancel his franchise. Mr. Berry will testify that he did not want the boat line and he refused to take it on and he was in fact summarily canceled by Schiavina.

THE COURT: Wait a minute. His testimony is that he was told to take on what line?

MR. FREISHTAT: Johnson Motors in 1961 came out with a boat line that prior to that time they did not have. Evinrude did the same at the time and they were attempting to establish boat dealers.

THE COURT: When did this take place?

MR. FREISHTAT: The latter part of 1961.

A Mr. H. E. McFadden, M-c-F-a-d-d-e-n, will testify as to the details of the termination of this Johnson franchise in 1961 after some twenty years of business; that the Johnson District Representative specifically and

in no uncertain terms laid down a policy that he had to purchase certain types and amounts of Johnson motors which he, [788] McFadden, had not customarily stocked and which he had no use for and could not sell; that he was told by the District Representative that either he take on these additional lines or that he, the District Representative, would in fact cancel him.

THE COURT: Now, this is to take on an additional line of parts?

MR. FREISHTAT: Additional engines that Mr. McFadden had no use for. He will further testify that his distributorship is in a locale where only low horsepower engines are used, that is, on a lake, as compared to a more open area and that he could not sell any higher horsepower engines.

That upon his refusal to take on the higher horsepower engines, a heated argument ensued and Mr. McFadden told his District Representative that he would not take it on and in no uncertain terms to get out of his place and he ceased his relationships with Outboard Marine.

THE COURT: Who would Mr. McFadden identify as the District Representative? Is this Mr. Schiavina again?

MR. FREISHTAT: No, sir, this is not Mr. Schiavina. This is another District Representative, the name of which will be supplied by Mr. McFadden. At the moment, I do not know it, sir.

THE COURT: Where is Mr. McFadden's place of [789] business?

MR. FREISHTAT: This is in Hagerstown, sir.

THE COURT: Now, wait just a minute. Now, when did you say that this took place in point of time that his testimony would relate to?

MR. FREISHTAT: 1961, sir.

THE COURT: 1961. Thank you.

MR. FREISHTAT: Mr. Skip Hanson of Geneva, Illinois will testify as to the details of his summary cancellation as a dealer of Johnson motors on thirty days'

notice after twenty nine years of enfranchisement; that he was told by the District Representative that Johnson Motors gave blanket authority to its District Sales Managers as to cancellations and renewals; that he, the District Representative, could in fact cancel Mr. Hanson's franchise.

Mr. Tommy or Thomas Bronson, B-r-o-n-s-o-n, of Memphis, Tennessee will testify as to the abrupt termination of his Johnson Motor franchise after thirty years of operation; that the District Sales Representative of Johnson informed him that he, the District Representative, could act with unilateral authority and did so by demanding that Mr. Bronson build a new showroom and when Mr. Bronson could not comply by summarily terminating his dealership.

He, in addition, was told by the District Representative that whatever he, the District Representative, [790] recommended to the factory was always and invariably followed.

Mr. Lester Jackson of Falls, Oklahoma, will testify that his Evinrude franchise was abruptly cancelled after twenty-two years of dealership; that the District Sales Representative of Evinrude threatened cancellation and did in fact cancel when Mr. Jackson balked at ordering certain unnecessary items of inventory; that he was told by the District Representative that the factory always supported the District -- was told by the District Representative that the factory always supported the District Sales Representative in a decision to cancel.

I, in turn, contacted the factory and I was informed by the factory that the recommendations of the District Representative would always be followed; that previously in about 1958 or '59, being uncertain of the time, Mr. Jackson expressed interest in a second line of engines. He was told by the Evinrude District Sales Representative a Mr. Jack Sullwood, S-u-l-l-w-o-o-d, that Evinrude's policy forbade the handling of a second line and that if Mr. Jackson would take such a line, he would cancel his Evinrude franchise.

THE COURT: When does he say that his dealer's franchise was canceled?

MR. FREISHTAT: It ultimately was canceled in the latter part of '59.

[791] Mr. Peter Schauer, S-c-h-a-u-e-r, will testify that he was the District Sales Representative for the Dorsett Boat Company from 1961 through 1963 and that Amplex was one of his largest accounts; that Amplex was amongst his biggest and best dealers, owing to its merchandising, displays, service, promotion facilities and attitude; that he sought out dealers, largely Johnson and Evinrude dealers, since these represented the best retail outlets in the industry and that Johnson and Evinrude engines had the greatest public acceptance; that the Boating Industry magazine is the accepted trade journal for the marine industry and is relied upon by all in the industry.

That he lost confidence in Amplex when the Johnson franchise was terminated because from his experience, he realized that such a loss would either cripple or kill a dealer of Amplex's size and volume; that he personally observed at Amplex a rapid decrease in sales and of Dorsett boats after the termination by Johnson and that he knew this from his experience and personal observations to result directly from the dealer's inability to maintain sales volume with secondary brands of outboard motors such as Mercury or Scott.

That until the loss of the Johnson franchise, Dorsett had only a few, if any, minor collection problems with Amplex but that subsequent to the loss of the Johnson [792] franchise, the dealer gradually developed serious financial problems; that in his experience with Johnson and Evinrude dealers throughout his territories, very few, if any, Johnson or Evinrude dealers carried a secondary line, an additional line.

Mr. Robert J. Robichaud, R-o-b-i-c-h-a-u-d, --

THE COURT: Spell it again for me, please.

MR. FREISHTAT: R-o-b-i-c-h-a-u-d, Robert Robichaud of New York City would testify as to his educa-

tional background that he obtained a BS in business administration from the New York University, that his major was economics, specifically statistics, that his minor was mathematics and marketing; that he has in excess of thirty credits toward his Master of Economics degree; that in 1965 and up till the present time, he's employed by the Chemical Construction Corporation as an Operations Research Consultant.

THE COURT: 1965?

MR. FREISHTAT: Yes, sir. It's in reverse. They are giving his most current occupations.

THE COURT: Very well.

MR. FREISHTAT: Operations Research Consultant, which pertains to profit orientation, statistical analysis projections; that in November 1964 through November of '65, he was employed by the Tidewater Oil Company as a Supervisor of Operations Research and Planning; that his major function [793] was to plan and supervise all Eastern Division management science projects and this included analyses and forecasting systems as to profits and also a thorough review and analysis of the supply and distribution functions.

In June of '63 through November '64, he was employed by the Socony, S-o-c-o-n-y, Oil Company.

THE COURT: I think it is generally pronounced Socony but it makes no difference.

MR. FREISHTAT: Socony Oil Company as a Project Analyst for corporate supply and distribution. The position consisted of developing an integrated linear programming model of supply and distribution and profit projection and analyses.

September 1959 through October 1961, he was a New York University Graduate School of Retailing Instructor and Research Assistant; that he is the author of the following publications: Do Christmas Catalogs Stimulate Purchasing in 1960 Journal of Retailing; Comparative Analysis of Sales and Profits, published in 1959, the Journal of Retailing; The Big Drop, a Study of Declining Retail Profits in 1960, Journal of Retailing; A Report to

the Marine Retailer, fall of 1961 sponsored by Outboard Boating Club of America, seventy-five pages, and Retail Store Profits in 1965, which is to be published this fall.

Mr. Robichaud will testify that in 1960, he was [794] a member of the New York University School of Retail Research team that at the invitation of Outboard Boating Club conducted a detailed survey of the retail marine market throughout the United States; that as one of the key men in this survey, he personally interviewed at considerable length numerous boat and motor dealers throughout the nation, including many in the Baltimore area.

That he has been engaged in the fields of retail operations and operations research for several years and is considered an expert in these fields; that in the summer of 1960, he personally interviewed the principals of Amplex and subjected the Amplex dealership to a most thorough inspection in every respect, including therein display, merchandising, location, management, finances, internal controls and so forth; that upon the conclusion of the nationwide survey, he ranked Amplex among the outstanding dealerships in the United States and so informed officials of Johnson Motors at the Chicago trade show in the fall of 1960.

That the vast majority of the largest and best dealers he and his teams inspected were Johnson and Evinrude dealers; that the Outboard Marine products clearly were the most abundant and most desirable in the market; that in his opinion, based upon his knowledge in retail marketing and his personal knowledge of Amplex and of the marine industry, that Amplex, like any other merchant with a key product line, [795] suffered an irreparable loss upon the termination of its Johnson franchise and that any small business, upon suffering such a setback, would find it virtually impossible to recover; that he has conducted an exhaustive study by established operations research methods into the plight of Amplex subsequent to the loss of Johnson to determine the probable damages to the company.

He will testify for the Court not only as to projections and findings as to damages but also reasonable and recognized substantiation of his conclusions that the damages resulted from the loss of the Johnson franchise.

Mr. Canzona will further testify --

MR. OWEN: Is that name correct?

MR. FREISHTAT: Yes.

MR. OWEN: Mr. Canzona will resume?

MR. FREISHTAT: Yes. That prior to the actual termination of Amplex's Johnson franchise, he personally informed Mr. Foster at Amplex on September 14th in the presence of Mr. Schiavina of Mr. Schiavina's motive for canceling and Mr. Foster again at the Chicago trade show in the presence of Harry James of Lone Star.

That Amplex sold approximately fifteen or twenty Mercury motors in 1962, as compared with almost 150 Johnsons in 1961 and that the largest number of Mercury engines ever sold from Amplex in any subsequent year was about forty; that [796] Amplex sold approximately fifteen Gale motors in 1962, having purchased about twenty, and that Oubotard Marine stopped production of Gale outboard motors in 1963, distributing its left-over stock to Johnson and Evinrude dealers at reduced prices.

That the McCulloch Corporation closed its Minneapolis plant in '63, for all practical purposes removing itself as an effective competitive force in the eastern market.

Further, at the present time, there are no marine dealers worthy of note handling the Scott engine in the Baltimore metropolitan shopping area.

Further, at the present time, there are five Mercury dealers in the metropolitan Baltimore area, including Northern Anne Arundel County. One is a plumbing and heating establishment by the name of Theiss, T-h-e-i-s-s. Another is a small lumber company by the name of Jordan. Two are primarily small outboard service shops that also sell engines by the name of Doetsch,

D-o-e-t-s-c-h, and Champ's and one is a small marine dealer; that by virtue of facilities, location, advertising, boat show promotion and other obvious manifestations, the major outboard dealers in the metropolitan Baltimore area today are Imperial, a Johnson dealer, and Marine Basin, a Johnson dealer, Smith, a Johnson dealer in two locations, and Jenkins, an Evinrude dealer.

That would conclude the proffer. Excuse me.

[797] A Mr. John Cornwell, C-o-r-n-w-e-l-l, will testify that in the latter part of 1962, he was the Sales Representative for Traveler Boats; that at the Captain's Table, a normal meeting place for marine representatives, he engaged Mr. Schiavina in a conversation in which Amplex was discussed. Mr. Cornwell will testify that he was considering the establishment of Amplex as a Traveler Boat distributor and he was told by Mr. Schiavina that Amplex -- he had canceled -- he, Mr. Schiavina, had canceled Amplex because they took on the Mercury engine.

That he, Mr. Cornwell, prior to going to work for Traveler Boat Company, was employed as the District Representative of the Mosley, I believe it is, Paint Company, a supplier of marine outboard paints, and that in this capacity, he visited Amplex regularly from 1960 through 1963 and that he always observed excellent displays as to boats and engines, as well as — well, strike that.

* * *